

BANYA (Migration) [2019] AATA 2404 (7 May 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Ms Patricia Mamie BANYA
Miss Aminata JABBIE

CASE NUMBER: 1712693

DIBP REFERENCE(S): BCC2014/3188137

MEMBER: Russell Matheson

DATE: 7 May 2019

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decisions not to grant the applicants Partner (Temporary) (Class UK) visas.

Statement made on 07 May 2019 at 12:00pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – not genuine spousal partners – evidence does not show parties in genuine and continuing relationship – financial, social or commitment aspects of relationship not indicative of genuine and mutual commitment to shared life – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65, 359

Migration Regulations 1994 (Cth), r 1.15A, Schedule 2, cls 820.211, 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 7 June 2017 to refuse to grant the applicants Partner (Temporary) (Class UK) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named applicant (the applicant) is a 40-year-old female national of Sierra Leone. She applied for the visa on 21 November 2014 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 of Schedule 2 to the Regulations because the delegate was not satisfied the applicant was the spouse of the sponsor. The applicant seeks review of the delegate's decision.
4. The applicants appeared before the Tribunal on 7 November 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor and the sponsor's daughter. The hearing was conducted with the assistance of an interpreter in the Krio and English languages.
5. The applicants were represented in relation to the review by their registered migration agent.
6. For the following reasons, the Tribunal has concluded that the **decision under review should be affirmed**.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act.
8. The Tribunal has before it the applicant's file from the Department of Immigration (the Department); its own file; and a copy of the Department's decision provided by the applicant to the Tribunal.

9. Hearings

10. The first hearing held on 29 August 2018 was adjourned because the Tribunal was unable to acquire the services of an interpreter in the Krio and English languages.
11. The second hearing was adjourned at the request of the applicant because she wanted her migration agent to be in attendance. The applicant informed the Tribunal that her agent was overseas and would not return until 20 October 2018. The review hearing was eventually held on 7 November 2018 with an interpreter and the applicant's migration agent in attendance.

Whether the parties are in a spouse or de facto relationship

12. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian permanent resident.
13. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3) of the Regulations, which is extracted in the attachment to this decision.

Are the parties validly married?

14. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The applicant provided a copy of the marriage certificate registered under the *Marriage Act 1961* indicating the applicant and sponsor were married at Guilford, New South Wales, on 14 September 2013. There is no evidence before the Tribunal to indicate that the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
15. In forming an opinion as to whether they are in a marital relationship and in considering whether they have a mutual commitment to a shared life as husband and wife to the exclusion of all others, whether their relationship is genuine and continuing, and whether they live together and not separately and apart on a permanent basis as defined in s.5F(2)(b)-(d), the Tribunal has had regard to all the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship, the nature of the applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3).
16. After careful consideration of all of the evidence before it, the Tribunal has reached the conclusion that it is not satisfied the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below, the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.
17. The Tribunal had the benefit of the applicant's and the sponsor's oral evidence and witness at the hearing and at times found them to be vague and their evidence lacked detail. The Tribunal gave all the evidence provided by the parties at the Tribunal hearing and evidence provided by the applicant to the Department and the Tribunal due regard. The Tribunal put a number of issues to the applicant in accordance with s.359AA of the Act and overall found the discrepancies in evidence overall minor and gave the parties the benefit of doubt. The Tribunal was satisfied with the explanations offered by the applicant and sponsor and places no weight on the inconsistencies in evidence given at the review hearing. The applicant's agent submitted that the parties were nervous and not used to the type of exposure of a review hearing and had a limited education. The Tribunal accepts the parties were genuinely nervous. The applicant addressed the inconsistencies in evidence in a statutory declaration dated 20 November 2018.

18. The Tribunal acknowledges the delegate's concerns set out in the primary decision record. The Tribunal discussed these with the applicant and the sponsor in the course of the hearing.

Are the other requirements for a spousal relationship met?

19. *Financial aspects*

20. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, especially in relation to major financial commitments, whether any person in the relationship owes any legal obligation in respect of the other and the basis of any sharing of daily household expenses.
21. At the time of application the parties provided a letter from Westpac Banking acknowledging the opening of a joint account in the names of the applicant and sponsor dated 4 March 2013. The parties have not provided any bank statements or any other evidence to show that they are using the joint account.
22. Post the first hearing date on 29 August 2018 the applicant provided a copy of a Westpac bank statement for an account opened on 31 August 2018 in the name of the applicant for the period 2 September 2018 to 2 October 2018. The parties also provided a Westpac bank statement in the name of the sponsor opened in December 2012 for the period 9 April 2018 to 1 October 2018, a Westpac bank statement in the name of applicant opened in May 2015 with five transactions for the period 19 September 2018 to 1 October 2018 and an ANZ bank statement in the name of the applicant for the period 13 March 2018 to 11 May 2018. The Tribunal finds the statements in individual names do not demonstrate any sharing or pooling of financial resources between the applicant and sponsor.
23. The Tribunal accepts that couples may decide to keep their finances separate, but the Tribunal does not accept that this is the case in this case. There is no convincing evidence before the Tribunal to indicate that the applicant and sponsor have made a genuine attempt to pool or share their financial resources from the time they were married in September 2013.
24. There is no evidence before the Tribunal that the parties have any joint ownership of real estate, major assets, joint liabilities or any one person in the relationship owes any legal obligation in respect of the other. The applicant has provided limited information regarding the financial aspects of the parties' relationship in relation to pooling and sharing financial resources or sharing daily living expenses. Based on the evidence provided the Tribunal finds that the financial aspects of the relationship are not indicative of the parties being in a genuine spousal relationship. The Tribunal places little weight on this aspect of the relationship.

25. *Nature of the household*

26. The Tribunal has considered the nature of the household, including any joint responsibility for the care and support of children, the living arrangements and daily routine of the parties and the sharing of the responsibility for housework, to form an opinion as to whether the parties are living together and not living separately and apart on a permanent basis.
27. The parties provided a lease agreement and tenant ledger dated from 17 July 2014 and gas and electricity bills in joint names for the period of December 2014 to July 2015. The Tribunal places some weight to these documents as evidence that they occupied the same house during that period.

28. The couple gave consistent evidence about their living arrangements at their current residential address and previous address, employment history and hours of employment. They provided detailed and consistent evidence of their personal history, living arrangements and household responsibilities, the purchasing of household items such as furniture and their daily routine and activities and the caring and support of the applicant's daughter and granddaughter. The parties stated that they had notified government agencies that they were in a spousal relationship.
29. The Tribunal accepts that the parties live together and they have established a joint household and share the responsibility of the housework. The Tribunal accepts the applicant and sponsor provide some care and support to the applicant's daughter and granddaughter.

30. Social aspects

31. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinions of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
32. The parties provided individual statutory declarations in regard to the genuineness of their relationship. They also provided a number of statements from friends, their local pastor and family day care business claiming to know the couple are in a genuine relationship and living together. The Tribunal places little weight on the statements as they lack detail and give little insight into the inception and development of the relationship. The Tribunal places some weight on the statement from the applicant's friend Beatrice Essay who provides some detail in regard to the parties' relationship, social activities, living arrangements and family.
33. The applicant and sponsor provided some additional photographic evidence of their social activities to the Tribunal. The parties have provided photos taken with each other and with friends with the visa application. While the Tribunal accepts the photos indicate that the applicant and sponsor have undertaken some joint social activities together, the Tribunal is of the view the photographic evidence provided alone does not constitute convincing evidence of a committed spouse relationship as there is little other supporting evidence of the social aspects of their relationship. The parties stated that they have never travelled together at any time and have a limited circle of friends that they associate with in their church. The applicant said that she is the only one who has friends and the sponsor has no friends. The parties said that they have attended a number of weddings together but could not remember when or whose weddings they had attended. The parties provided a copy of a wedding and birthday invitation with their names written on them but there is no supportive evidence of them attending the events. The Tribunal places little weight on the invitations as evidence of their social activities and neither party could remember the other invitations or the events or the names of the people who had invited them. The Tribunal considered the parties' oral evidence vague, inconsistent and lacking in detail when describing the social aspects of their relationship.
34. The parties provided photos of their wedding ceremony to the Department with the visa application. The photos show only the applicant and sponsor. Given the limited nature of the photos and the fact that they are of the applicant and sponsor in each other's company, the Tribunal places little weight on the photographic evidence in regard to the social aspect of their relationship.
35. There is little convincing evidence that demonstrates that the parties present themselves as a couple to family or the wider community or they undertake regular joint social activities together. The applicant and sponsor have never taken holidays or short breaks together, and

there is little supportive evidence that they have attended any significant events together. The Tribunal accepts that they met at church and attend church together.

36. Overall, in considering the limited evidence given by the applicant and sponsor the Tribunal does not find that the parties represent themselves to others as being in a committed spousal relationship or that they are regarded by other people as being in a genuine and continuing spousal relationship. The Tribunal accepts that they have planned and undertaken some joint social activities together and attend their local church. The Tribunal places little weight on this aspect of the relationship.

37. Commitment

38. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length of time the parties have lived together, the degree of companionship and emotional support they provide each other and whether the parties view the relationship as a long-term one.
39. The applicant and sponsor claim to have met at a church gathering in Auburn in November 2011 and their relationship developed in the ensuing months and they moved in together in January 2012 living in Guilford, NSW. The parties married each other on 14 September 2013. The applicant provided a copy of the marriage certificate with the visa application. The Tribunal accepts that the parties are married. To date, the applicant and sponsor have been in a relationship for a period of time exceeding seven years and have provided limited evidence of their commitment to each other.
40. The sponsor gave evidence that he has named the applicant as a beneficiary of his superannuation. The applicant said that she has no superannuation benefits. The parties provide no documentary evidence of this occurring and the Tribunal places little weight on the evidence provided.
41. The parties have provided little evidence of combining their affairs and very limited supportive evidence of their relationship prior to lodging the visa application. Based on the evidence provided at the hearing, there is very limited evidence that is indicative of the parties being in a genuine and continuing relationship at the time of the visa application.
42. The parties stated that they wanted to grow old together and supported each other in sickness and health. The applicant's daughter told the Tribunal that the parties have been together for a long time. The applicant stated that she has made up her mind to live with sponsor and sees their relationship as a long-term one.
43. The parties both indicated that they see their relationship as a long-term one; however the accompanying evidence and oral evidence provided at the Tribunal hearing by the parties in relation to the financial, social, and commitment aspects of their relationship does not support this notion. The Tribunal accepts that the evidence provided in regard to the nature of the household indicates that the applicant and sponsor live together but there is little support evidence of them living in a marital relationship. The parties have not provided any convincing evidence of mutual obligation, companionship, emotional support and long-term planning which are typical components of a marital relationship.
44. While the Tribunal is satisfied the applicant and sponsor are legally married, there is insufficient evidence before the Tribunal that the parties see their relationship as a long-term one, that they draw emotional support and companionship from each other or that they have a commitment to a shared life together. The Tribunal places little weight on this aspect of the relationship.

45. **Findings**

46. Overall, having considered all the circumstances of the relationship, the Tribunal finds that the weight of evidence does not support a finding that the parties are in a genuine and continuing relationship. The Tribunal does not consider the financial, social or commitment aspects of the parties' relationship as being indicative of a couple with a genuine and mutual commitment to a shared life together.
47. On the basis of the above the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision. There is no information before the Tribunal that the applicant would satisfy any of the alternate criteria for the grant of the visa.
48. Given these findings the Tribunal is not satisfied that at the time the visa application was made or the time of this decision the parties were in a spousal relationship and therefore they do not meet cls.820.211(2)(a) and cl.820.221.
49. The Tribunal is satisfied that the secondary visa applicant is a member of the family unit of, and made a combined application with, the primary applicant who did not satisfy cl.820.211(2)(a). The Tribunal is satisfied the primary applicant does not meet cl.820.221 of Schedule 2 to the Regulations. Therefore, the secondary applicant does not meet the requirements of cl. 820.321 of Schedule 2 to the Regulations.

DECISION

50. The Tribunal affirms the decision not to grant the applicants a Partner (Temporary) (Class UK) visa.

Russell Matheson
Member

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ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).